

STATE OF MICHIGAN
COURT OF APPEALS

SHERRY SOLANO,

Plaintiff-Appellant,

v

STANDARD FEDERAL BANK,

Defendant-Appellee.

UNPUBLISHED
February 21, 2003

No. 238107
Wayne Circuit Court
LC No. 00-040795-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff left defendant's building after transacting business, and was walking to her car when she tripped on a raised portion of a sidewalk and fell to the ground, sustaining injuries. She filed suit, alleging that she was on defendant's premises as a business invitee, and that defendant failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. She also alleged that the raised portion of the sidewalk constituted a nuisance in fact in that its natural tendency was to create danger and to inflict damages on persons and property.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the condition of the sidewalk was open and obvious, that no special aspects of the sidewalk made it unreasonably dangerous in spite of its open and obvious condition, and that there was no issue of fact regarding whether the condition on its property constituted a nuisance. The circuit court granted defendant's motion, concluding there were no genuine issues of fact regarding whether the condition of the sidewalk was open and obvious, or whether any special aspects made the sidewalk unreasonably dangerous in spite of its open and obvious condition. The circuit court also concluded that the condition did not constitute a nuisance as a matter of law.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 609; 537 NW2d 185 (1995).

Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person of ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp.*, 464 Mich 512; 629 NW2d 384 (2001).

Plaintiff argues that there were genuine issues of fact regarding whether the uneven sidewalk was open and obvious and whether it presented special dangers. We disagree.¹ In her deposition, plaintiff admitted that she was not watching where she was stepping as she exited the bank, and that had she been doing so, she would have observed the raised portion of the sidewalk and would have been able to avoid it. The fact that plaintiff claimed that she did not see the raised portion of the sidewalk is irrelevant. *Novotney, supra*, 477. While an average person is not required to closely inspect every inch of a surface upon which he or she might step, public policy requires a person to take reasonable care for his or her own safety. *Bertrand, supra*, 616-617. It is reasonable to conclude that plaintiff would not have been injured had she been watching the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc.*, 234 Mich App 490, 497; 595 NW2d 152 (1999). The affidavit from plaintiff's liability expert did not create a question of fact in light of plaintiff's testimony that had she been watching her step, she would have seen the raised portion of the sidewalk. Plaintiff did not produce sufficient evidence to create an issue of fact regarding whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *Novotney, supra*, 474-475. The circuit court did not err in concluding that the raised portion of the sidewalk constituted an open and obvious danger.

Further, plaintiff's argument that the condition of the sidewalk was unreasonably dangerous under the circumstances is without merit. The weather conditions and the proximity of the sidewalk to the building were not special aspects of the sidewalk itself. Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo, supra*. Had plaintiff simply watched her step, any risk of harm would have been obviated. *Spagnuolo v Rudds No. 2, Inc.*, 221 Mich App 358, 360; 561 NW2d 500 (1997).

Plaintiff also asserts that there were genuine issues of fact regarding whether the condition constituted a nuisance. Again, we disagree. A public nuisance is an unreasonable

¹ Plaintiff's assertion that the open and obvious danger doctrine does not apply to claims of failure to maintain is erroneous. The doctrine applies to both failure to warn and failure to maintain cases. *Joyce v Rubin*, 249 Mich App 231, 236; 642 NW2d 360 (2002).

interference with a common right enjoyed by the general public, and includes conduct which: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience; (2) is proscribed by law; or (3) was known or should have been known by the actor to be of a continuing nature which produces a permanent or long-lasting significant effect on the public's rights. A private citizen may pursue an action for a public nuisance if he can show that he suffered a type of harm different from that of the general public. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). An actor is subject to liability for a private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if: (1) the other has property rights and privileges attached to the use or enjoyment interfered with; (2) the invasion resulted in significant harm; (3) the actor's conduct was the legal cause of the invasion; and (4) the invasion was either intentional and unreasonable or intentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra hazardous conduct. *Id.*, 193.

No evidence raised a genuine issue of fact regarding any theory of nuisance. The circuit court properly granted summary disposition of that claim.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra